

Recognising an ecological ethic of care in the law of everyday shared spaces

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Recognising an Ecological Ethic of Care in the Law of Everyday Shared Spaces

Abstract

Law plays a vital role in the life and loss of open shared spaces, used and enjoyed on an everyday basis by local people. In this article, we adopt an analytical framework based on an ethic of care to critique the registration of land as a 'town or village green', using the example of an inquiry into the greens status of an ancient woodland. Analysing written and oral witness statements in this inquiry makes clear the centrality of such places in many people's lives, giving rise to community-based, and forward-looking, interests. However, the legal focus upon quantitative assessments of individuals' use of land in the recent past means that the prospective consequences of losing such valued areas are currently poorly acknowledged, and accounted for, in the registration process. This leads to the question whether an ethic of care towards everyday shared spaces may be better recognised via more deliberative plan-making regimes.

Key words: Everyday shared spaces, local greens, knowledge claims, ethic of care, feminist theories, deliberative theories, witness statements.

Introduction

Easily accessible and shared areas of land hold great communal value for local people and the prospect of losing such places through development and decline is often a matter of serious concern and distress, leading to protests and legal action. In this article, we address the role of law in the life and loss of such spaces, specifically town or village greens, and critically assess the current legal provisions for registering and designating land as a green. This analysis is rooted in the law on greens in England and Wales. This may evoke an archetypal grassy village green, characteristically featuring a cricket ground or football pitch and other communal pursuits. However, the 'green' designation also, less typically, embraces coppiced woods, unplanned urban and suburban spaces, sites within and between housing estates, and beaches (Farley and Symmons, 2012; Grindrod, 2017), owned and managed by local government, land trusts, or private owners (Clarke, 2006, Pieraccini, 2010, Mackay, 2014).

In this article, we examine the significance and meaning of such areas of land for people living nearby, and their use of law to protect them. These issues arise in many different contexts, frequently forming part of, or triggering, broader social and environmental movements of protest and resistance, and calls for justice (Blomley, 2004, Beitel, 2013, Cooper, 2013). In short, 'greens' have considerable polemical and political power, offering a physical site within which battles over the desirability of alternative and future lived environments are envisaged and played out (Kirwan, Dawney and Brigstocke, 2015).

An example of the working of law in this area, and the nature of the consequences for

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local people and communities, is the following case study of a public inquiry to help a local authority decide whether to register as a green Smithy Wood, an ancient woodland lying on the outskirts of Sheffield, England. This case study approach, supporting socio-legal research based on interpreting a range of materials, events and encounters, allowed us to draw together different perspectives of how people relate to, and value, a local green space and to judge the extent to which such relational aspects can inform decision-making outcomes. The aim of this case study is not to represent a ‘typical’ application process; instead, its value lies in enabling analysis of how certain theories and perspectives manifest themselves in a set of events and procedures (Mitchell, 1983: 188), with consequences for the ‘lives people live’ and the injustices they are subjected to (Sen, 2009: 10).

Analysis of the witness statements submitted as an essential part of the inquiry into the registration of the wood as a green revealed a close and multi-faceted relationship with ‘nearby nature’ (Brennan, 2016: 9), characterised by longevity, depth of feeling, and resistance to reductive assessments of the development potential of the wood. In particular, during the inquiry, it became clear that the statements perform an important function of recording social and community-based declarations about how local people relate to the land and seek to protect and care for it. In this article, we present several dominant and recurrent themes drawn from the witness statements: futurity and legacy; knowledge and learning; heritage and identity; and care and responsibility, and relate these to theories of environmental and ecofeminist ethics.

In analysing these themes schematically, we identify a broad distinction between the expression and reception into the legal procedures for registering a green of

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3 *generalisable* (ecological and future generation) interests, and *sectional* interests
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5 (representing private or individual concerns). Whilst the majority of witnesses expressed
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7 generalisable interests, significantly, the legal test for registering a green is predicated
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9 upon a set of narrow, sectional, criteria aimed at establishing individuals' use of land for
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11 'lawful sports and pastimes' over the preceding twenty-year period. As well as making
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13 fulfilling this test a considerable challenge for the applicants, this tension between the
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15 temporal scale and object of interests created a mismatch of expectations and
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17 experiences of the registration process as between legal professionals and local people,
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19 making the inquiry a highly contested and unconstructive decision making forum. This
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21 insight contributes to debates about giving voice to everyday (lay) evidence in decision-
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23 making by interweaving empirical data with feminist theories and critical geography
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25 approaches.
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33 Mapping out this article, we first explain the main form and features of the legal
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35 framework because of the strong influence on the work of the public inquiry of the law
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37 governing the registration of land as a town or village green. We then identify and
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39 analyse the breadth and depth of values and meanings attaching to this area of land by
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41 local people, drawn from written and oral witness statements. Working from feminist
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43 theory and critical geography perspectives, we identify within the statements an 'ethic of
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45 care', arising from the regular use and enjoyment of the wood. More practically, we
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47 consider as a further route for local communities wishing to protect areas of nearby land,
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49 the relatively recently promulgated designation of local green space, advanced in
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51 planning policy (National Planning Policy Framework (NPPF), 2019: 28-29). Relating
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53 deliberative theory and planning practice, our suggestion is that local people's sense of
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55 care and responsibility for everyday shared spaces may be better recognised and acted
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upon for protective purposes using this form of spatial designation in plan-making, at least when this is characterised by deliberative elements.

Legal framing of town or village greens

Land may be registered as a town or village green if it can be established that a *significant* number of people in a *locality* have used the land '*as of right*' (meaning as if a right existed, or, in other words, without permission, force, or secrecy) for 'lawful sports and pastimes' for at least 20 years (Commons Act 2006, s.15). This test reflects the ancestry of greens by which the statutory enclosure of common lands generally included some allotment of 'waste' land for use and enjoyment by local people, for example for exercise, recreation, and gathering wood, nuts and fruits. The granting of wasteland softened some of the blows and brutality of the enclosure movement, which for centuries pursued the privatisation and consolidation of small, subsistence landholdings, and tracts of common land, to create larger farms. Greens are therefore one product of radical land reform: a private property right, akin to an easement, held by groups of local people, to enjoy rights over land, whether owned by a private individual or public body.

This legal root explains the unusual, hybrid (public/private) nature of the town or village green designation. It also helps to give this corner of law the appearance of an anachronism, for example the 'lawful sports and pastimes' requirement has its origins in attempts to exercise a 'civilising' and controlling influence on the life of the labouring poor through land use during the eighteenth and nineteenth centuries (McCardle, 1991: 76). Notwithstanding this long history, greens carry considerable contemporary resonance and significance, providing important reservoirs and corridors for nature (Lawton, 2010;

European Commission, 2013), as well as maintaining and improving social cohesion, mental and physical health (Public Health England, 2014), and conditioning child development (Alcock, 2014).

The statutory recognition of a valid community-held and customary right to continue long-standing use of an area of land as a green issues a powerful protective designation by invoking nineteenth century statutes preventing encroachment or enclosure on a green;ⁱ together, these render unlawful most forms of development. Although the greens designation has powerful effects, the combination of spatial and temporal conditions for designation set out in the 2006 Act imposes a heavy evidential burden on applicants, particularly when judged against the resources commonly deployed by land title holders or developers engaged in opposing such applications (Open Spaces Society, 2014). This makes seeking to register land as a green a significant legal affair, triggering administrative and legal procedures presenting a great many hurdles and challenges for local groups.

First, when making an application to a registration authority to recognise the existence of a green, the applicant must define the boundary of the 'locality', a far from simple exercise. The test then requires the applicant to draw up a twenty-year timeline of specific uses and to name local users of the land forming the subject of the application, gleaned from witness statements and other written sources, ideally supported by photographic evidence of that use (newspaper reports, private photos). Any gaps in use, inaccuracies, or lack of supporting evidence will very likely prove fatal to an application. Finally, the judgement of 'significance' in terms of the number of people in the locality who have used the land over the twenty-year period is necessarily a subjective

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3 evaluation of fact and degree on the part of the inquiry inspector and, ultimately, the
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5 decision-making local authority, albeit that such findings are constrained by legal
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7 parameters.ⁱⁱ
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12 Remarkably, these many legal hurdles do not prevent widespread engagement with this
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14 area of law: on average 120 applications are made each year and approximately one
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16 third of these are granted (DEFRA, 2013),ⁱⁱⁱ figures which represent a significant, but
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18 highly risky, level of community involvement with a complex, time-consuming, and
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20 expensive procedure. The application procedure is now also subject to some
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22 uncertainty, the product of relatively recent legislation (the Growth and Infrastructure Act
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24 2013, schedule 4) aimed at speeding up the planning process by preventing
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26 development from being thwarted by a late ('rear guard'), community-based application
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28 for greens status.
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35 More generally, the application of law relating to greens has the effect of restricting
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37 greatly the scope of spaces to which it applies. The Supreme Court's judgment in
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39 *Barkas*^{iv} decided that land cannot be registered as a green where its use by the public
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41 was permitted by a statute – making the use 'by right', rather than, as required by the
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43 2006 Act test, 'as of right'. This judgment disrupted abruptly a flow of judicial opinion
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45 and findings offering an expansive and facilitative reading, 'in the public interest', of the
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47 legal requirements by which land be registered as a green (Open Spaces Society, 2014).
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49 Specifically, in *Sunningwell* (1999),^v the House of Lords made irrelevant the subjective
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51 belief of users about their right to use land 'as of right'; and in *Beresford* (2004),^{vi} that a
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53 local authority's acceptance of the use of its land by the public did not necessarily mean
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55 that it had given permission for this use (and thereby preventing a greens application).
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3 In contrast, *Barkas* amounts to a serious barrier to groups and individuals seeking to
4 register land as a green, and indicates the capacity of this area of law to generate
5 controversy and strength of feeling on the part of both developers and campaigners
6 (Meager, 2010). *Barkas* has also brought about a shift in thinking about how best to
7 allocate and protect green spaces (Open Spaces Society, 2014). The designation of
8 local green spaces in the course of neighbourhood plan making (NPPF, 2019: 28-19)
9 now appears, at least superficially, a more attractive option for some communities who
10 wish to preserve green spaces, as discussed further below.
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24 The influence of the legal test and legal framing of town or village greens law on the
25 registration process is highly significant for local communities wishing to see their
26 applications translated into protective designations. As a sub-class of common land,
27 greens act not just as valuable signifiers of the public interest in shared land; they
28 provide a physical and material base for community and connection. 'Community' (from
29 *communitas*), meaning 'held in common', provides a strong sense of the relationship
30 between the existence of common land and the shared use of that land by local people.
31 Such spaces provide means of connecting with nature, and, through nature, with one
32 another. We return to these powerful signals of commonality and mutuality conveyed by
33 the presence, use and protection of greens, below, in the context of analysis of the
34 witness statements submitted in support of the application to register Smithy Wood as a
35 green.
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56 Valuing nature and measuring loss in the Smithy Wood inquiry

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In 2013, residents of a housing estate close to Smithy Wood sought to register it as a green within the terms of the 2006 Act. The name of the fifteen-hectare wood derives from the ironstone seam lying beneath which was worked, originally by monks, as early as the 1160s (Jones, 2009). The site is now naturalised and considered to be valuable in ecological terms (Sheffield and Rotherham Wildlife Trust, 2017), even though it has suffered neglect and harm due to damaging activities, such as quad bike racing, seemingly sanctioned by the landowner. The application to register the land was triggered by the site being threatened by the development of a motorway service station (the wood adjoins the M1 motorway, following its dissection by the motorway in the 1960s).

A public inquiry into the application took place in 2015 and the proceedings, chaired by an inspector, were formal in tone and structure. The inspector welcomed witnesses to the inquiry and listened carefully to their statements and answers to questions. Site visits, primarily for the inspector’s benefit, took place at the beginning and end of the inquiry. During the inquiry, the witnesses (the majority being members of the residents’ group supporting the application to register the wood as a green) were questioned closely on their statements, submitted in support of the application.

Analysis of this set of witness statements forms the basis of the Smithy Wood case study. These statements document how local people use and value land, and offer an opportunity for people to express concerns and fears about the possible loss of such spaces. Our focus on the role of witness statements, as community-based, historical, and educational texts informing decision-making practices and outcomes, was inspired by Doreen Massey’s research detailing how ordinary spaces become ‘deeply engrained

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3 in people's lives' (Massey, 2005: 13). Accordingly, our emphasis is upon how local
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5 people's subjective and personal statements of relation and care towards the land
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7 constitute significant examples of 'everyday evidence', as shaped by the writers'
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9 situation, context and values.
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14 This focus on witness statements also brings to life Massey's description of space as the
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16 'simultaneity of stories-so-far' (2005:11). This now celebrated phrase describes
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18 succinctly the 'contemporaneous existence of a plurality of trajectories' (2005:11), for
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20 example, developmental, conservatory, or preservationist, capable of being pursued
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22 concurrently in a certain space, with these paths determined by the outcomes of many
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24 different relationships and interactions. Finally, the accent upon witness statements
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26 represents a deliberate and empirically tested expansion of both methods and sources in
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28 environmental law, developed in a broader research context aimed at appreciating the
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30 common conditions and consequences of environmental injustices across time and
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32 space (Holder and McGillivray, 2017).
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40 Practically speaking, witness statements make up a vital part of the bundle of supporting
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42 documents submitted with an application to register land as a green, and subsequently
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44 provide a structural backbone to public inquiries convened to assist the decision maker in
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46 finding whether the test to establish a green is satisfied. Witnesses face questioning on
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48 the factual content of their statements by lawyers (usually, counsel) representing the
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50 applicant community group and opponent and an authority appointed inspector oversees,
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52 mediates, and reports these proceedings. Well over one hundred such statements may
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54 support a single application. In the Smithy Wood case study, there were far fewer (26),
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56 largely because of time constraints on the applicant. Late changes to the boundary of
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the ‘locality’ (for the purposes of the test for greens in the 2006 Act) meant that only 15 statements were admissible as evidence, a decision which led to much legal debate, but was ultimately upheld.

The first stage of research was a textual analysis of the witness statements, seeking out the essential expressions of sentiments, values and understandings contained within them, and grouping together the strongest and recurrent themes. We combined this with observing the significance of the statements in structuring and directing lines of questions at the subsequent five-day public inquiry. Finally, we assessed the influence of witness statements on the substance of official decision-making via inquiry reports and recommendations, supplementary legal opinions and decision letters, for example in instances when the inspector relied explicitly on excerpts from these as supporting evidence of the applicant’s or opponent’s cases, and by evaluating their relative contribution to findings of fact and/or law. Working through these stages of analysis, focussing on witness statements gave us unique insights into the (generally limited) role of local people and community groups in local decision-making about their shared environments and, more broadly, the practical working of local environmental democracy. This documentary analysis, when combined with observing the inquiry and attending pre-inquiry meetings and a site visit, amounts to an extensive body of research material.

Witness statements as everyday evidence

The content of the witness statements supporting the greens application and related documentary material is analysed according to a thematic schema presenting key themes in the statements and highlighting some of the connections and overlaps between these. This schema distinguishes between generalisable (ecological and inter-generational) interests and sectional (private, individual or vested) interests. These terms describe broadly the potential outcomes of deliberative decision-making, as analysed most fully in literature on planning, and the release of chemicals and GMOs (Lee, 2009; Armeni, 2016). Models of deliberative democracy (such as Habermas' ideal speech situation (1970)) are, according to Robyn Eckersley, more likely to privilege generalisable interests over sectional interests. In her view, generalisable interests more closely align with ecological interests, and their alliance creates an important driver for the move from liberal democracy to ecological democracy, a precondition for the founding of a 'green state' (Eckersley, 2004: 117).

Such an outcome – privileging generalisable interests over sectional interests - prevails when, as Eckersley describes, political communication is undistorted by power imbalances and when key, mutually constitutive, features of deliberative democracy are present. These essential features are: *unconstrained dialogue* (mutual understanding through rational assessment of arguments based on 'propositional truth, personal sincerity, and normative rightness' (2004: 116)); *inclusiveness*, in the sense of 'enlarged thinking' or the 'imaginative representation to ourselves of the perspectives and situations of other[s] in the course of formulating, defending, or contesting proposed collective norms' (2004:116); and *social learning*. The last feature encapsulates the ideal speech situation. This is where participants engaged in public dialogue are 'moved

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3 to change their position by the force of the most appropriately reasoned argument rather
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5 than by extraneous considerations' (Eckersley, 2004: 117, original emphasis). This
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7 capacity to move position, when underpinned by a fundamental moral norm of respect
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9 for the autonomy of others, requires that individuals' proposed norms must be
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11 acceptable to others. For Eckersley this last requirement is a vital steering mechanism,
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13 engendering moves towards generalisable arguments, and public interest environmental
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15 advocacy (2004: 117).
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22 These key features, providing the basis for deliberative models of democracy, make
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24 such models well suited to dealing with polycentric and complex environmental concerns
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26 and problems (Eckersley, 2004: 117). In particular, deliberation provides conditions for
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28 the continual public testing of claims and questioning from the perspective of 'differently
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30 situated others', including from those most likely affected by a proposed project, policy or
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32 practice (Eckersley, 2004: 118). This greater openness of deliberative processes to
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34 those most exposed to risk and change ideally puts into reverse the ceding of decision-
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36 making to alliances of powerful professional, scientific and corporate elites, a regressive
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38 process described by Habermas as the 'scientization of politics' (1970: 62).
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45 Furthermore, the 'other-regarding' orientation of deliberative democracy may, for
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47 Eckersley, encompass an enlarged community of those who may benefit from public
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49 discourse and deliberation - including those yet to be born and non-human species
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51 (2004: 120). This ecological ideal of political communication, based on 'representative
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53 thinking' on behalf of others, offers a radical reinterpretation of speech community,
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55 restricted to communicatively competent subjects in Habermas' original workings.
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57 Eckersley conceives of such decision-making, when guided by a strong version of the
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precautionary principle, as a form of trusteeship held by humans for nature (2004: 127-38). This achieves the goal of protecting those incapable of participating actively in discourse (Eckersley, 2004: 135).

In summary, precautionary, long-term, and public interest principles of decision-making may flow from advancing a deliberative ideal, to the great benefit of a wide circle of communities, generations, and species. The communicative ethic, extended by Eckersley to include nature, enhances deliberation for the preservation of the environment (Brulle, 2002: 7). Eckersley remains alert, though, to the procedural and institutional challenges associated with trying to realize fully this set of ideal circumstances in which ecological democracy and ecological justice can flourish, recognising that, even in carefully constructed deliberative fora, political resistance and privilege may predominate (2004: 119). Arguably, in adversarial settings such as the Smithy Wood inquiry these latter characteristics are more pronounced.

In the inquiry, witness statements, both written and given as oral evidence, aligned profoundly with generalisable interests, with many witnesses wanting to safeguard the wood for their grandchildren, and, more generally, future generations of children and residents. In contrast to this orientation, *sectional* interests establish the main frame of reference for setting both the legal test and legal procedures and the participation and conduct of participants in the decision-making process. Analysis of the relative expression and influence of these interests therefore provides a useful frame by which to conceptualise the concerns and underpinning values at stake, in this case of an adversarial form of decision-making, in which applicants sought to establish a right to continued use of the land. In the following presentation of this analysis, WE refers to

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written evidence submitted in advance of the inquiry, and OE indicates oral evidence given at inquiry.

Generalisable interests

(i) *Futurity and legacy*

A substantial number of witnesses to the inquiry included in their statements a sensitive calculation of what is at stake for future generations, overshadowing statements about their longstanding use of the wood for ‘lawful sports and pastimes’. The following extracts from witness statements provide examples of how local people express this sense of responsibility to future generations:

‘...how many trees have to be cut down unnecessarily, what legacy are we leaving our grandchildren and their grandchildren [?]’ (WE 13).

‘This woodland of Smithy Wood dates back to at least 1200 AD. We really must protect it for future generations, so that they can see nature as it is, and so that we don’t lose any more species of wildlife’ (WE 14).

‘...how important it is to maintain these areas for our future. I want to be able to show my son where my parents took me as a child’ (WE 3).

‘Doesn’t Ancient Woodland and Green Belt mean that these areas are to be preserved for our future generations to enjoy’ (WE 1).

‘I want to make sure these woods, especially Smithy Wood, is there for the next generation of youngsters as it has been for the last 20 generations and therefore wholeheartedly support this application to make Smithy Wood a Village Green’ (WE 11).

‘[P]lease help us to protect this irreplaceable, Ancient Woodland of Smithy Wood from any future development by granting our request to make Smithy Wood our village green, so that it will be there for future generations to enjoy...there is a significant amount of local residents who are all passionate about keeping this woodland for future enjoyment’ (WE 3).

Importantly, because only past (twenty year) use is relevant, this type of future-looking evidence, which both understands and respects the ecological ‘timescape’ (Richardson,

2017) is of no relevance. This has seriously adverse consequences for giving voice to the 'future generational' elements of sustainability - the ability of natural systems to continue indefinitely to sustain and nurture life' (Shiva, 1992: 189) - and jars with recent attempts to oblige decision makers to retain biodiversity and ecological integrity for future generations, through imposing statutory duties, overseen by a 'future generations' commissioner.^{vii}

Scales of time are also significant in the statements, making clear that the accessible and 'everyday' quality of use of the wood contributed to making it so special. In the wood, 'time repeats itself' (OE 8) - on a generational basis ('I go to the woods with my grandchildren as I did as a child' (OE 5)), as well as yearly ('[T]here are a lot of blackberries here...some years are better than others' (OE 4), and daily (for dog walking). Such statements emphasise the seemingly arbitrary nature of the 20-year time limit, and give weight to arguments about the need to better synchronise environmental governance with nature's temporalities, fostering 'a slower, more flexible and holistic understanding of time' (Richardson, 2017: 8).

(ii) *Knowledge and learning*

Both the witness statements and responses to questions at the inquiry make clear local people's extensive knowledge of the wood, and its wide range of bird, plant and animal species, as in this example:

'There are many birds which can be seen [there] such as chaffinches, bramblings, flycatchers, tree creepers and nuthatches. I have seen blue tits and great tits, jays, magpies, crows, robins, wrens and chaffinches and heard the woodpeckers in Springtime. Kestrels and buzzards...can now be seen flying over Smithy Woods. There are foxes, shrews, hedgehogs, numerous rabbits and squirrels, and there was a badgers den there previously...Bats can often be seen at dusk in the summer and there is also a diverse population of butterflies. I also believe there are adders living on the site' (WE 3).

This naming and locating of species in the wood provides a set of vocabulary for its protection and markers of the loss and displacement of species (Macfarlane, 2016). The knowledge held by local people about the wood further portrays a sensitivity to the seasons: '...the sound of a skylark's song is immediately recognisable and one of the great joys of early Summer' (WE 8), fostering a close connection between place and time.

Also apparent on the part of local residents is pride in their knowledge about the wood's distinctive features, most notably a glade of beech trees stunted by pollution from nearby coke ovens, built in the 1920s but now disused ('there is a beech coppice there unlike any other' (WE3)). During the inquiry and at the prior site visit, witnesses reminisced about being able to climb easily to their tops, even as children. Likewise, witnesses pointed to distinctive archaeological features in the wood, such as medieval bell pits, used in formative mining, and sawpits, for working timber.

The wood offered opportunities to educate children about nature, in an otherwise largely industrial landscape. One of the witnesses, a retired teacher, describes having collected leaves, acorns, seeds, and nuts from the wood to take to her class (OE 3). Another witness recalls visiting the wood for a school project on local history and paying attention to the bell pits (OE 1). In less formal terms, other witnesses linked enjoyment of the wood with learning:

'We all have many memories of walking through this woodland looking for leaves, birds, and enjoying what an ancient woodland can bring to a child and their education in caring for our wildlife' (WE 2).

'...I used to go to see many species of birds, bugs and also enjoy being able to run through the leaves and learn from my parents how important it is to maintain these areas

for our future' (WE 4).

Similarly, a witness recalls tracing fresh animal trails left in the snow in the wood: '[W]hat better way to learn about nature...unlike most things today, it is free and educational' (WE 3). Smithy Wood is remembered as 'an ideal place to teach children about nature...we would go on nature walks, and take nets and jam jars and learnt to draw and identify trees from their leaves' (WE 6).

These examples point to a form of environmental education firmly established in a place, with an associated quality of personal connectedness (Holder, 2013; Howe, 2017). As well as equipping children with a vocabulary for learning about nature, and attributing meaning to their experiences in nature (Macfarlane, 2016:9), such embodied learning is capable of forming part of a broader collective and reflective inquiry, providing the motivation to act on behalf of nature (Orr, 2004), as these statements suggest:

'In Smithy Wood I learnt the love of nature' (OE 6)

'[M]y daughter spent her younger years playing in and around the woods and now takes a keen interest in the environment, which I believe stems from her time exploring the woods' (WE 6).

Mostly, the environmental education or learning from being in the wood was informal, differing markedly from more organised forms of challenge-based ('outward bound') education programmes. Instead, the wood offered children a place to build dens, camps and tree houses (witnesses talked about having to 'pull their children' away at dusk for tea). The picture drawn by witnesses was one of themselves, and their children, of feeling 'at home' in the wood. Finding such a tangible connection to the natural world is to feel 'at home in nature' (Cajete, 1994).

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(iii) *Heritage and identity*

Rather than bearing witness to a single event, the written and oral evidence provides a remarkable record of the accretion and evolution over time of a depth of feeling and sense of connection with this area of land. Local residents relied heavily on a historical appraisal of the wood (Jones, 2009) to support their application, adding this to ‘our reasons for wanting to retain this area as our village green, it is our history’ (CRAG, 2014). This strong sense of the wood constituting the community’s history is not just a consequence of the ancient quality of the wood, revealed by topographical features such as bell pits, but also derives from its more recent history, such as coke smelting. The wood thereby contributes to the history of the area’s broader industrial landscape. That the site has now naturalised, providing a home to flora and fauna (‘the site had gone to nature for over 40 years since the coking plant at Smithy Wood closed in 1972’ (WE 3)), provides a further layer of ecological history.

The historical importance of the site also has a personal dimension, with witnesses to the inquiry linking key dates in the wood’s history (several fires, changes to entry points, quad bike racing) to significant points in their own private histories and family timelines – of children leaving home, retiring, falling ill, bereavement, the arrival of grandchildren, and ownership of dogs. The history of the wood is clearly and closely bound up with the identity of local people:

‘I still cannot believe that anyone would even consider sacrificing yet another place of history...How many of these historic places do we have to pull down before someone realizes that this is our history we are destroying and stands up and says NO!!!’ (WE 1).

‘We...are in danger of losing some place of peace and quiet away from the humdrum of modern life and where we can learn about and see nature, our heritage, something so precious’ (WE 8).

Smithy Wood dates to the twelfth century. As identified above, this timescale highlights the limited nature of the legislative protection: the wood has a long and meaningful history and is relied upon not only for 'lawful sports and pastimes', but also because it provides a valuable and valued connection with nature *and* the past which is difficult to measure in quantitative terms, and impossible to replicate. The twenty years use of the land, which forms the basis of the legislative test, represents no more than a slither of time. In contrast, the wealth of the ancient past and prospect of its use far into the future is what motivated local people to seek to protect the land and to work so hard to amass the body of evidence needed to satisfy the legal test for registering land as a green.

(iv) *Care and responsibility*

The witness statements provide an empirical base for analysing critically the reception and recognition in legal proceedings of everyday evidence about a collective sense of care and responsibility for nature. The statements describe how local people perform a role of guardian or steward towards the wood, especially by monitoring and reporting to the local wildlife trust damage to the wood and loss of species, as indicated, for example, by not hearing cuckoo calls, even in springtime (OE 4).

A sense of care and responsibility flows from recognition of the damage suffered by the site in the recent past and the prospect of further damage, and eventual loss of the wood to development. Witnesses express several meanings of loss in their statements. Prime amongst these is a sense that the loss of nearby woodland further enhanced the natural value of Smithy Wood ('It is even more precious now since the adjacent site of Hesley Woods is to be opencast mined to retrieve the coke' (WE3)). Notably, this sense of loss

is in terms of wildlife as well as loss of 'recreational space'. Less tangibly, the impact envisaged, and a sense of care, is extended to future generations:

'[T]he wildlife that lived there [Hesley Woods], we were told by the planners, would move to adjacent woodland, so it is imperative that we protect that woodland, Smithy Wood' (WE3).

'Having lost so much already I fear this loss for myself and future generations, but mostly for the wood itself' (WE 5).

Witnesses recognise what has already been lost in the wood from damage caused by such vicissitudes as fires, but also more wilfully by the recreational ploughing up of the land by quad bikes. This backward- and forward-looking assessment (what has been lost and what will be lost) is bound up with, and reinforced by, an idea that certain species, and the wood itself, are irreplaceable:

'To be able to walk amongst the native trees of England is a wonderful experience and bearing in mind the great loss of our magnificent elm trees and the current threat of Ash die back, please help us to keep this large section of Smithy Wood which could never be replaced' (WE 15).

In this practical context of inquiry proceedings, the expression of care and responsibility forges an important point of contact between two theoretical approaches – a feminist argument of relational ethics and critical geography's contextual and constructivist reading of space. It also forces recognition of an ethical root in how people relate to and care for each other, and their environments, in a commonplace and everyday way, in response to specific and often communal circumstances of meaning, correspondence, and connection, as developed originally in feminist theory (Gilligan, 1982; Curtin, 1991). Developing a feminist and politicised version of an ethic of care, Curtin debates a distinction between 'caring *about*' (generalised, intellectualised and lacking direct relatedness) and 'caring *for*' (contextualised and aimed at specified recipients) (Curtin, 1991; 67). She considers that caring *about* may 'lead to the kinds of actions that bring

one into the kind of deep relatedness that can be described as caring *for*: caring for particular persons in the context of their histories' (67). By analogy, caring deeply for a specific place in recognition of the histories, identities, and meanings it holds, can translate into a wider appreciation (which may be expressed politically) of its essential and integral connection with wider ecological and social systems. An 'ecological ethic of care' therefore provides one way by which environmental protection concerns can become 'scaled up', acting through, and beyond, particular geographies.

Applying feminist theories in this way connects and combines a *relational* sense of self with a strong sense of responsibility for others, and the environment (Warren, 1990; Plumwood, 2002). This lends a contextual understanding of the relevance of specific circumstances and places for social relations and interactions, and the conduct and outcome of behaviours and decision-making, having a bearing upon broader threats to nature. As a result, complex, but clear, connections may be seen between everyday struggles to protect small parcels of land used on a communal basis and larger scale environmental degradation, and the impact of the widespread loss of such spaces on the state of human physical and mental health. This ecological orientation of a feminist conception of an ethic of care is capable of politicisation, so that it becomes relevant in conceptualising the problem, as well as the value, of protecting the natural world. For example, radical responses to climate change have become associated with an ethic of care, directed at safeguarding the lives of future generations (Okano, 2016).

As a critical geographer working at the point of overlap between feminist theories of relational ethics and a corresponding ethic of care, Whatmore rejects the entrenched divisions and distinctions between nature and society, and between humans and non-

humans. She recognises in their place 'relational configurations – living fabrics, spun between humans and nature' (2000: 297). This moves us beyond treating environmental (non-human) relations as 'passive contextual extensions of human well-being' (1997: 14), and towards imagining the non-human realm as completely interwoven with the actions of its human counterparts. By identifying the ethical significance of non-human life forms and ecological processes and systems, Whatmore advances as the basis for justice a 'more relational understanding of ethical competence' (1997: 41). This forces us 'to face up to a suddenly enlarged community that is no longer "other"' (2000: 270), but instead is bound up with shaping 'the business of [our] everyday living' (2000; 297).

Whatmore's argument for reconfiguring, and considerably enlarging, ethical community has significant spatial implications and these clearly intersect with, and reinforce, the driving concerns of various environmental protection movements. In particular, recognising an ecological dimension to an ethic of care brings a private, moral imperative of love, attention, and a sense of responsibility out of the private sphere and into the realm of environmental politics. This has potential to impact upon and challenge politics and law by showing up the great value and general interest of shared nature and the harshness and poverty of a collective loss of shared spaces. From this perspective, arguing for the protection of Smithy Wood, as a matter of care and responsibility, in the context of legal proceedings, becomes a highly significant and political act, notwithstanding that this argument failed to satisfy the legal test for establishing a green, which is more representative of sectional interests.

Sectional interests in the inquiry

The main work of the inquiry was to establish, as a matter of law and fact, the satisfaction of the legal test - that the use of the wood for lawful sports and pastimes had been by a significant number of inhabitants^{viii} of the neighbourhood and that the 'quality of user' was sufficient.^{ix} In ascertaining this evidence, counsel for the opponent developer cross-examined witnesses on the extent and nature of their use of the land via questions that were individualised, and predominantly quantitative and factual, such as the following:

'How often did you walk your dog in Summer?'
'How often in Winter?'
'How many people did you see when you walked your dog?'
'Does your dog walk on a lead?'
'Does your dog come back when you call him?'
'How did you get to the wood?'
'Why did you not use the local park to walk your dog?'
'What footwear did you use?'

These lines of questioning aimed at establishing whether the use of the wood was along established footpaths to reach a destination. Such use of footpaths suggests a linear 'right of way', rather than more widespread untrammelled following of 'lines of desire' (paths that do not necessarily lead anywhere) for recreation, sports or pastimes, evidence of which could help to establish a green.^x However, such cross-examination was also frequently strongly adversarial and aggressive in style, such as including questions aimed at discrediting the veracity of the accounts, for example by highlighting minor inconsistencies, and, more seriously, overtly questioning the credibility of the witnesses. This manner of advocacy had the effect of inhibiting responses, leading witnesses to make defensive or incomplete statements and to become distressed: one witness exclaimed 'I can hardly breathe now', and another, 'my knees are still knocking'.

Further negative consequences flowed from the requirement that applicants establish,

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precisely, the nature and extent of the use of the land over twenty years. These included creating a heavy administrative load for the applicant and, at inquiry, a considerable evidential burden for witnesses; recalling events from over a long period, and in fine detail, proved difficult and frequently stressful. Witnesses appeared caught ‘off guard’ when faced with lengthy lines of questions, particularly when these aimed at establishing the existence of a ‘right of way’ rather than, as expected, a ‘green’. Such cross-examination revealed a disjuncture between the content of the witness statements, the majority of which conveyed a great depth of feeling and connection with the land, and the opponent counsel’s narrower, sectional, points of reference, framed by the legal test. In summary, attending the inquiry required considerable resources on the part of the applicants - time, energy, legal expertise, administrative help, and emotional support – and the need for these resources was exacerbated by the nature of the legal test, demanding highly precise, and backward-looking, evidence of past use and enjoyment of the wood.

Inspector’s findings of fact and law

The Inspector’s report is a tightly written and factually descriptive document, recalling times and dates of use, names of those who used the site, and even dog breeds. It offers a representation of the inquiry proceedings, but edits out many of the broader concerns detailed in witness statements submitted in support of the application, and volunteered (rather than solicited) during questioning. In particular, the strict emphasis upon quantitative assessments of the extent of use of the wood suggests objectivity and rationality, and shifts attention away from possible alternative interpretations of the evidence drawn from witnesses.

This is seen, for example, in the inspector 'stripping out' from his consideration all accounts of use of the land by paths (Sheffield City Council, 2015: para. 716), leading to a significant reduction in the number of people recorded as using the land for lawful sports and pastimes. In response, the applicant argued that the very nature of the wood, being impenetrable in places, led visitors to use meandering pathways, and that this should not detract from their evidence about using the wood 'as a green'; nor should it be considered indicative of the use of a 'right of way' (which more usually links two points) (CRAG, 2015). The applicant considered the matter of paths and inaccessibility of parts of the Wood should be 'approached in a common sense rather than a mathematical way' (CRAG, 2015: 1). However, such arguments did not lead the inspector to alter his finding that the 'vast majority of the use was for a footpath type use' (Sheffield City Council, 2015: para. 6.31), with this having particularly harsh consequences for the applicant's case.

Turning to the other findings of fact, as applied to the legal test, the inspector concluded that the use of the Wood was insufficient to indicate general use by the local community for informal recreation, rather than occasional use by trespassers. In this part of the report, the inspector adopts a dismissive tone about the reliability of the witnesses' accounts:

'Whilst all the witnesses were trying to assist the Inquiry I do not accept that the totality of the use of Smithy Wood was very great. The frequency of use and the number of people typically who use the site are difficult to recollect going back over a 20 year period. There were some of the witnesses who were imbued with the idea that it would be beneficial to "save" Smithy Wood from development. ... These factors whether consciously or unconsciously led to some overstatement of the frequency of visits and the consistency of visits over a period. ... I accept the evidence of [an opponent witness] that people are often lazy about where to go for recreation and if it is not close they will not use it very regularly. There are of course exceptions to this and those with a motive to go further like dog walkers or nature

enthusiasts may go further. However the distance leads me to suspect that the use of Smithy Wood was not as great as some suggested' (Sheffield City Council, 2015: para. 7.6).

The specificity of the legal test, whilst posing considerable challenges for witnesses, clearly does not prohibit such broad assertions and assumptions on the part of the inspector. In addition, the emphasis upon quantitative assessments of use, and with the gaze of the inquiry turned firmly backwards in time, left no opportunity to consider the consequences of the loss of the wood to development, even though this was many of the witnesses' prime concern. Admission of such consequential reasoning would inevitably introduce a speculative and subjective element to the proceedings, at odds with the apparent objectivity of the inquiry.

Sheffield City Council decided not to register Smithy Wood as a village green, a decision based on the inspector's finding that the number of local people from the local neighbourhood who used the land was 'trivial and sporadic' (Sheffield City Council, 2015: para. 7.11). In summary, local and ecological values were overrode by sectional interests, which were able to speak more to the legal criteria. The prospective developer's application to develop the site remains live since the application for development consent for the motorway service station is on hold while an application for a similar development in a nearby area is determined. This means that the documentary material and evidence gathered for the purpose of the greens application remains relevant and potentially influential in terms of other, pending (development consent) decisions and determinations. In particular, the local residents' group and wildlife trust have used the witness statements written to support the registration of the wood as a green to strengthen their continuing case against the service station development, most

recently taking the form of a petition calling on Government to protect all ancient woodland.^{xi} In this context of likely development, a planned compensation project aims to 'offset' the resulting loss of biodiversity, offering an unfortunate opportunity to test empirically the limits and potential flaws of such schemes in ecological terms (Sheffield Wildlife Trust, 2017).

Community-identified local green spaces in plan-making

Above, we used the term 'everyday evidence' to describe the rich body of local knowledge and sentiment expressed in witness statements. These statements provide an intimate record of lived experience, and interpreted history of a certain space, often drawn from many sources, spanning generations, and with a gaze more upon the future, than the past. Our analysis of witness statements and oral evidence reveals a strong sense of the intrinsic value of a space, combined with an awareness of the political possibility of pursuing alternative futures for that space, in a way which best cares for it, and protects it for the benefit of future generations. This analysis of witness statements emphasises also the construction and interpretation of knowledge according to its specific contextual background. This is in line with feminist theorists' questioning of the production and presentation of knowledge as objective, disengaged, and representing universal truths (Rose, 1997; Whatmore, 1997). Haraway, for example, points to the 'slippery ambiguities' of objectivity and the concomitant depiction of truth as universal by stressing that knowledge is instead embodied, marked and defined by its place and time of origin (1988: 580). Her search for a 'usable' and feminist doctrine of objectivity leads, through an allegory of differential and partial positions in vision, to recognising the significance of 'situated knowledge' (1988: 580).

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5 The Smithy Wood case study highlights the considerable practical difficulties involved in
6 gathering, and giving voice to, the depth and complexity of meanings underpinning
7 community-based, or 'everyday' evidence, in making decisions about the protection of
8 the environment, in this case, via the legal process of registering greens. From feminist
9 theory, an ethic of care, developed in private settings of responsibility, underpins our
10 argument that people's caring connection with a local area, on an individual and
11 collective basis, should be better respected and dignified, with specific political and legal
12 consequences flowing from this recognition.
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26 English national planning policy has latterly provided a forum for the reception of such
27 arguments about recognising the collective value of local spaces, with the introduction of
28 a discretionary 'local green space' designation in planning policy. This new designation
29 forms one aspect of a far-reaching programme of 'democratic renewal' of the planning
30 system, based on principles of localism and neo-liberalism (Gallent and Robinson, 2013;
31 Allmendinger, 2016). The 'local green space' designation is reserved for spaces which
32 are 'demonstrably special to a local community and hold[s] a particular local significance,
33 for example because of its beauty, historic significance, recreational value...tranquillity or
34 richness of wildlife' (NPPF, 2018: 29). Although presented in policy as forming part of a
35 drive to 'promote healthy and safe communities' (NPPF, 2018, para. 99), the designation
36 arose more specifically from the practical need to mitigate the increased difficulty of
37 registering greens following enactment of the Growth and Infrastructure Act 2013 (HM
38 Government, 2014).
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58 The 'local green space' designation embeds in procedures to develop local and
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neighbourhood plans. Aspects of these procedures bear some of the hallmarks of deliberative decision-making, discussed above, particularly encouraging public participation and discussion on the merits of attributing this status to a particular place. The experience of designating local green spaces has not yet been subject to sustained scrutiny, although the drafting of tool-kits suggests that both local authorities and pressure groups are getting prepared,^{xii} and some examples of both successful and unsuccessful cases are emerging, including in parallel with an application to register land as a town or village green. In principle, the 'specialness' criteria is broad enough to embrace the broad categories of generalised interests outlined above in the analysis of witness statements (the headlines of which are legacy, identity, learning and care). However, early signs suggest that demonstrating that land is special to the local community is not straightforward, leading some local authorities to design quantitative criteria and 'tick box' methodology to signal 'specialness', as a proxy for deliberation (Elmbridge Borough Council, 2016).

Importantly, the local green space designation opens up a prospect of legal recognition of a broader category of 'greens' than that corresponding to the slender set of legal criteria which must be satisfied in order that land be registered as a 'town or village green' under the 2006 Act. However, local green space designation may prove far weaker in terms of legal protection because of the requirement that allocations of such spaces should be 'consistent with local planning of sustainable development...and complement investment' for example in home building and other infrastructure (NPPF, 2019). Perhaps most problematically, policies for managing development within a designated local green space should be 'consistent with those for green belts' (para. 101), a land designation latterly coming under increasing pressure from developmental

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strains.

Conclusion: recognising a collective sense of care

Local open spaces such as the ancient woodland of Smithy Wood help to create and maintain vital connections between biodiversity and social diversity, and to enhance quality of life. People using and sharing such spaces on an everyday basis recognise these connections and find value in them and the relationships that develop as a result. Our analysis of the role and significance of witness evidence during the Smithy Wood inquiry establishes that local people there tended to express broad-ranging and forward-looking (generalisable) interests in the preservation of this nearby area of open land. The language of witnesses seeking to register Smithy Wood as a green is heavy with powerful and evocative ideas – of legacy, locality, and futurity. These ideas, forming the basis of much current environmental thinking, are rooted deeply in people’s relationship with ‘nearby nature’.

In contrast, the ‘lawful sports and pastimes’ test, providing the organising focus of the greens designation process, creates a restrictive and sectional evidential focus which fails to recognise, capture or connect the broader social, historical and ecological significance of the land for the local community. In the case of the Smithy Wood inquiry, the generous and well-founded desire on the part of local people to protect land for ecological reasons and for the enjoyment, use and education of future generations was missing from the core subject matter for deliberation and decision-making. This contributed to considerable tension in the inquiry and a sense of unease and unfairness on the part of local people, faced with the prospect of a radical and disturbing change to

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3 their nearby environment.
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8 Working from feminist theories, an ecological rendering of an ethic of care offers a
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10 potentially expansive but firm theoretical underpinning to environmental debate,
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12 deliberation and decision-making. This theoretical development recognises the
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14 significance and special quality of relationships embedded in the material world of
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16 woods and a multitude of other green and shared spaces. A potentially important and
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18 recent representation of this is the ability of communities to attribute 'specialness' to land
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20 in the very practical domain of policy setting and local plan-making when seeking to
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22 designate areas of land as local green spaces.
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28 Local plan making offers also an opportunity to deliberate the changing nature and
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30 significance of shared spaces as the ecological imperatives of renewable and micro-
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32 energy generation and local food growing come clearer into focus. Alongside such
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34 strategic planning, this designation may further be a reactive and lobbying tool to counter
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36 the loss of sites designated for their 'special' quality, as suggested by the flurry of local
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38 plans opposing the periodic use of planning as a vehicle for rapid economic growth
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40 (Gallant and Robinson, 2013: 158). This quality is reminiscent of groups seeking town
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42 or village green registration to protect land from development, an ability now more or
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44 less arrested. In summary, town or village green registration and 'local green space'
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46 designations are not mutually exclusive decision making processes, but the greater
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48 scope for public participation and deliberation may make local green space designation
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50 more amenable to the expression and recognition of a broader range of relational
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52 attributes, reflecting interests of a general, communal and ecological nature. Positively,
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54 the coordination and collaboration of community members, engaged in the demanding
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3 legal enterprises of greens registration or plan making, can have fruitful consequences
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5 for civil society, regardless of outcomes (Gallent and Robinson, 2013: 162).
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10 In this article, we have highlighted how the process of registering greens can elicit
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12 precise documentation of practices of everyday life and small actions of community,
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14 relation and responsibility, and we have sought to draw out the meaningful nature of
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16 these examples of 'everyday evidence'. These practices and actions constitute the
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18 material basis for 'better future histories' in ecological terms (Gear and Grant, 2015: 1),
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20 with multiple and highly specific processes of exchange and inter-relation constructing
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22 and shaping spaces (Massey, 2005; Keenan, 2015: 55), in this case by demarcating the
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24 boundaries of protection for valued shared spaces. Of course, recognising relations of
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26 care and other ecological subjectivities within these boundaries raises the need to
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28 consider broader and more far-reaching ethical, legal and political responsibilities to
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30 nature and community, *outside* these areas, and on a range of geographical scales.
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For Peer Review

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ⁱ S.12 Inclosure Act 1857 and s. 29 Commons Act 1876. UKHL 25.
ⁱⁱ *R (McAlpine) v Staffs CC* [2002] EWHC 76 (Admin).
ⁱⁱⁱ More up to date statistics are lacking, although the Open Spaces Society deals with approximately 600 such cases a year.
^{iv} *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31, overturning *R (Beresford) v Sunderland CC* [2003] UKHL 60.
^v *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335, 349D-351H.
^{vi} *R (Beresford) v Sunderland CC* [2003] UKHL 60.
^{vii} Well-Being of Future Generations (Wales) Act 2016.
^{viii} *McAlpine* (n. ii).
^{ix} *R (Lewis) v Redcar and Cleveland BC* [2010] UKSC 11.
^x *R (Laing Homes Ltd) v Buckinghamshire CC* [2003] EWHC 2803, paras. 105-111.
^{xi} “New twist in four-year battle for Smithy Wood”, *The Yorkshire Post*, 30 March 2017; ‘New front opened in fight to prevent motorway service station from being built on ancient woodland in Sheffield’, *The Star*, 5 January 2018.
^{xii} E.g. Open Spaces Society, <https://www.oss.org.uk/new-tool-kit-to-save-open-spaces>.